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In the Supreme Court of the United States

OCTOBER TERM, 1952

No. 195

T. M. DUCHE & SONS, INC., *Petitioner*

v.

THE UNITED STATES

On Petition for a Writ of Certiorari to the United States Court of Customs and Patent Appeals.

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The majority and dissenting opinions of the trial court (R. 15-31) are reported in 26 U. S. Cust. Ct. 61. The majority and dissenting opinions of the Court of Customs and Patent Appeals (R. 58-69) are reported as C.A.D. 485 in 87 Treas. Dec. 64 (Weekly Pamphlet No. 18, May 1, 1952).

JURISDICTION

The judgment of the Court of Customs and Patent Appeals (R. 69) was entered on March 18, 1952. By order dated June 11, 1952, Mr. Chief Justice Vinson extended the time for filing a petition for a writ of certiorari to and including July 15, 1952 (R. 72). The petition for a writ of certiorari was filed on July 14, 1952. The jurisdiction of this Court is apparently invoked under 28 U.S.C. 1256.

QUESTION PRESENTED

Pursuant to Section 336 of the Tariff Act of 1930 the United States Tariff Commission conducted an investigation to ascertain the difference in the cost of production of dried whole eggs, dried egg yolk, and dried egg albumen (white) in the United States and in China, the principal competing country. It reported the results of its investigation to the President of the United States, who thereupon issued a proclamation increasing the rate of duty on dried egg products. The present suit was brought by an importer of dried egg albumen, alleging the proclamation of the President to be void. The question presented is whether the Customs Court has power to review the facts and conclusions upon which the Tariff Commission based its recommendation to the President that the rate of duties on dried eggs products be increased, and if dissatisfied to declare the proclamation void.

STATUTES INVOLVED

The pertinent portions of the statutes involved are set forth in the Appendix, *infra,* pp. 16-28.

STATEMENT

On June 24, 1931, the President of the United States proclaimed that a change in the rate of duty on dried whole eggs, dried egg yolk, and dried egg albumen was necessary to equalize the difference in the costs of production of those products in the United States and in the principal competing country, China, and that the duty which up to that time had been at the rate of 18 cents per pound as provided in Section 1, Par. 713, of the Tariff Act of 1930 (46 Stat. 590, 632; 19 U.S.C. 1001, Par. 713), should be changed to 27 cents per pound (R. 56-57). The proclamation was made after an investigation and report by the United States Tariff Commission under the flexible tariff provisions contained in Section 336 of the Tariff Act of 1930, *infra,* pp. 16-22 (R. 37-56). The Commission instituted the investigation on January 23, 1931, in compliance with United States Senate Resolution 389, adopted January 21, 1931 (R. 12-13). Public notice of a hearing was given on March 11, 1931, and a hearing was held on April 16, 1931, at which time interested parties were given an opportunity to be present, to produce evidence, and to be heard (R. 38). As a result of its investigation the Commission found that the duty of 18 cents per pound fixed by the statute did not equalize the difference in the costs of production of the domestic articles

and the Chinese articles, and that the duty necessary to equalize such difference, within the limits permitted under the statute, was 27 cents per pound (R. 40). It accordingly submitted to the President a report containing its findings (R. 35-56),[1] and its findings were approved by the President in his proclamation of June 24, 1931 (R. 56-57).

In making its investigation, the Commission used the years 1928 to 1930, inclusive, as a representative period of time upon which to base its findings with respect to the difference in the costs of production of domestic dried egg products and those imported from China (R. 38). The Commission found that the production of dried egg products in the United States during the representative period had been very small because the prices of the imported products had, despite the then existing rate of duty, been so low as to leave little incentive to engage in domestic production, although there were large industrial milk-drying facilities in this country which could be readily adapted to the drying of eggs (R. 43, 46-47). It further found that the determining factor in the cost of producing dried eggs in the United States was the amount paid for the shell eggs, which was more than nine-tenths of the total cost; that a domestic egg-freezing industry had been conducted on a large scale

[1] The Commission attached to its report a comprehensive summary of the information obtained in the investigation (R. 40-56).

during the representative period; that a large domestic egg-drying industry would have to buy its eggs in the same regions as those which supplied the domestic egg-freezing industry; and that the breaking-stock eggs used by the latter industry would, if used for egg-drying, furnish a product similar in quality to the dried egg products imported from China (R. 49). Accordingly, in order to give a broad basis for domestic raw materials cost, the Commission used, in lieu of the prices paid by the limited number of domestic egg driers, the weighted average of farm and central market prices for breaking-stock eggs delivered at the egg-freezing plants (R. 49-51). In computing the domestic operation costs in connection with the drying of eggs, the Commission used the actual operating costs of the domestic establishments engaged in the drying of eggs (R. 39). The Commission recognized that the actual operating costs of the few domestic egg-drying establishments might not give an entirely accurate indication of what operating costs would be if egg-drying were conducted on a much larger scale. It concluded, however, that the costs of domestic breaking-stock eggs amounted to such an unusually high percentage (90 to 95 per cent) of the total costs in the drying of eggs as to make any margin of error in the operating costs a matter of minor importance. (R. 53-54.)

After the President issued his proclamation, petitioner imported some dried egg albumen at the port of New York, which was assessed with duty

at the rate of 27 cents per pound pursuant to the proclamation. Petitioner thereupon filed a protest with the collector of customs at that port under Section 514 of the Tariff Act of 1930, contending that the proclamation was void on the ground that there had been no industry in the United States engaged in the production of dried egg products during or prior to the time the Tariff Commission made its investigation, and claiming that duty on the importation should have been assessed at the statutory rate of 18 cents per pound (R. 7-10). The assessment of duty on the importation at the rate of 27 cents per pound having been affirmed by the collector, the papers were duly transmitted to the Customs Court for decision as required by Section 515 of the Tariff Act, *infra*, pp. 27-28 (R. 9-10).

The Customs Court, one judge dissenting, overruled the protest and held, following the decision of this Court in the case of *United States* v. *George S. Bush & Co., Inc.*, 310 U. S. 371, and the decision of the Court of Customs and Patent Appeals in *T. M. Duche & Sons* v. *United States*, 36 C.C.P.A. (Customs) 19, certiorari denied, 336 U. S. 931,[2] that it had no jurisdiction to weigh the evidence which was before the Tariff Commis-

[2] At the trial of the case it was stipulated by the parties that the record in the prior case of *T. M. Duche & Sons, Inc., v. United States*, 36 C.C.P.A. (Customs) 19, might be incorporated into the record of the instant case (R. 11), which was done (R. 16). The record in the incorporated case consisted of the record in the case of *T. M. Duche & Sons, Inc.*, v. *United States*, 13 Cust. Ct. 26, which in turn included the record in the case of *David L. Moss Co., Inc.* v. *United States*, 26 C.C.P.A. (Customs) 381.

sion or to explore the reasons which actuated the President in making his Proclamation (R. 16-18). The Customs Court further held that the Administrative Procedure Act, providing for judicial review of the action of administrative agencies, was inapplicable to the acts of the President and the Tariff Commission, when proceeding under Section 336, Tariff Act of 1930 (R. 15-31).

On appeal, the Court of Customs and Patent Appeals, two judges dissenting, affirmed the decision of the Customs Court (R. 58-69).

ARGUMENT

The issues in this case are identical with those in the prior case of *T. M. Duche & Sons* v. *United States,* 36 C.C.P.A. (Customs) 19, certiorari denied, 336 U. S. 931, decided adversely to petitioner's contentions,[3] *viz.,* whether the Customs Court has jurisdiction to review the Tariff Commission's report and recommendations to the President that he act under Section 336 of the Tariff Act of 1930, *infra,* pp. 16-22), to change the rate of duty on imported dried egg products, and if dissatisfied to declare the proclamation later issued by the President to be void.

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[3] The reasons underlying our view that the decision of the court below in that case was correct are set forth at some length in the Government's Brief in Opposition filed therein (No. 523, October Term, 1948), to which this Court is respectfully referred.

Section 336 of the Tariff Act of 1930, *infra*, pp. 16-22, authorizes the Tariff Commission to make investigations for the purpose of ascertaining the difference in the costs of production of a domestic article and a like or similar foreign article when produced in the principal competing country. That section prescribes that in the course of the investigation the Commission shall hold a hearing and give reasonable public notice thereof, and shall afford reasonable opportunity for persons interested to be present, to produce evidence, and to be heard at such hearing. The Commission is required to report the information thus obtained to the President and to specify in its report such changes in the rates of duties or such changes in classification or in valuation basis as it finds to be necessary to equalize the costs of production of the domestic and the foreign article. The section then empowers the President to make the suggested changes in the rates (within 50% limits), in classification, or in valuation basis, if in his judgment such changes are shown by the investigation to be necessary to equalize the costs of production.

Petitioner makes no contention in the case at bar that the Tariff Commission failed to observe any of the procedural requirements of Section 336 with respect to the holding of a hearing, the giving of public notice thereof, or the affording of oppor-

tunity to interested parties to be present and to be heard at the hearing.[4]

1. The issues presented herein were decided adversely to petitioner's contention by this Court in the case of *United States* v. *George S. Bush & Co., Inc.*, 310 U. S. 371.[5] In the *Bush* case, which was relied on by the court below, and which involved judicial review of action taken by the President under Section 336 of the Tariff Act of 1930, *infra*, pp. 16-22, this Court cited *Norwegian Nitrogen Products Co.* v. *United States*, 288 U. S. 294, to the effect that the exercise by the President of the power which Congress has delegated to him for over a century under tariff statutes such as Section 336 is but one stage of the legislative process, and stated as follows (310 U. S. at pp. 379-380):

> And the judgment of the President that on the facts, adduced in pursuance of the proce-

[4] The Tariff Commission's report and the proclamation both show that all of these statutory requirements were observed (R. 38, 56).

[5] The prior conclusion of a majority of the Court of Customs and Patent Appeals in the case of *David L. Moss Co., Inc.* v. *United States*, 26 C.C.P.A. (Customs) 381, that the Customs Court had jurisdiction to determine whether there was any substantial evidence before the President to support the findings made by him in the proclamation here involved, was reached before this Court rendered its decision in the *Bush* case, and was disavowed by the majority of the Court of Customs and Patent Appeals in the prior case of *T. M. Duche & Sons, Inc.* v. *United States*, 36 C.C.P.A. (Customs) 19, certiorari denied, 336 U. S. 931, on the ground that it was unsound and because it was deemed to be at variance with the *Bush* decision.

dure prescribed by Congress, a change of rate is necessary is no more subject to judicial review under this statutory scheme than if Congress itself had exercised that judgment.[6]

Petitioner's assertion (Pet. 7, n.) that it seeks no review of the exercise of the President's discretion but only review of the Tariff Commission's action in making the recommendation to the President is self-defeating. Obviously, the Customs Court could grant no relief in this case without setting aside the Presidential proclamation, since the rate of duty established by the proclamation remains in force and effect so long as the proclama-

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[6] Petitioner again urges, as it did in the prior *Duche* case, that the decision of the court below is in conflict with the decisions of this Court (Pet. 11-12) in the cases of *Muser* v. *Magone*, 155 U. S. 240; *Waite* v. *Macy*, 246 U. S. 606; *Opp Cotton Mills, Inc.* v. *Administrator*, 312 U. S. 126; *Panama Refining Co.* v. *Ryan*, 293 U. S. 388; and *Crowell* v. *Benson*, 285 U. S. 22. These cases are all inapposite, and do not require extended discussion. They were all discussed in the Government's Brief in Opposition in the prior *Duche* case (No. 523, October Term, 1948). The *Magone* and *Macy* cases were both brought to this Court's attention in the *Bush* case (310 U. S. at p. 375), and apparently were not considered to be in conflict with the conclusions there reached. The other three cases cited by petitioner involved the constitutional power of the Congress to delegate legislative power. That issue has been resolved in the affirmative by this Court with respect to Section 336. *Hampton & Co.* v. *United States*, 276 U. S. 394. Furthermore, the other three cases were concerned with legal rights. But this Court has held that "No one has a legal right to the maintenance of an existing rate or duty." *Norwegian Nitrogen Products Co.* v. *United States, supra*, at p. 318; *United States* v. *Bush, supra*, at p. 379.

tion stands. The proclamation, not the Tariff Commission's report and recommendation, changes the rate of duty. "It [the Tariff Commission] does not increase or decrease the rates of duty; it is but the expert body which investigates and submits the facts and its recommendations to the President." *United States* v. *Bush, supra,* at p. 379. Petitioner's suit, which was brought under Section 514 of the Tariff Act, *infra,* pp. 26-27, seeks a refund of the duties which it paid in excess of the rate in force prior to the issuance of the President's proclamation, and it is beyond controversy that the Customs Court could not sustain petitioner's protest and direct a refund of the excess duties without holding the President's proclamation to be invalid. Since the procedural requirements of Section 336 were complied with in this case (see *supra,* pp. 8-9), it may not hold the proclamation to be invalid without interfering with the exercise of the President's discretion. Hence, the review which petitioner purports to seek in this case is tantamount to a review of the findings of the President which are embodied in his proclamation. Under the doctrine announced by this Court in the *Norwegian Nitrogen* and *Bush* cases, the President's action under section 336 of the Tariff Act, *infra,* pp. 16-22, is but a part of the legislative process and is not subject to judicial review. It is patent, therefore, that the relief which petitioner seeks in this case may not be granted as the result

of a judicial review of the Tariff Commission's action alone. Consequently, judicial review is barred by the decision in the *Bush* case.[7]

2. Petitioner makes the additional contention (Pet. 11) that the court below erred in holding that Section 10(a) of the Administrative Procedure Act (60 Stat. 237, 243; 5 U.S.C. 1009, *infra*, p. 28) does not require judicial review of the report and recommendations of the Tariff Commission other than to determine whether it has followed the forms of procedure required by Section 336 of the Tariff Act, *infra*, pp. 16-22. The contention is without substance. The judicial review provided for by Section 10(a) of the Administrative Procedure Act clearly contemplates the correction

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[7] Petitioner's contention (Pet. 13) that the *Bush* case is distinguishable is without merit. That contention, which was also made in the prior *Duche* case, is based on the ground that the *Bush* case was brought under Section 501 of the Tariff Act, *infra*, pp. 22-25, the language of which differs from Section 514 of that Act, *infra*, pp. 26-27, under which the instant suit was instituted. As we pointed out in the Government's Brief in Opposition (p. 16) in the prior *Duche* case, petitioner's contention is refuted by this Court's decision in *Norwegian Nitrogen Products Co.* v. *United States*, *supra*, for that case was brought under a statute identical with Section 514 with respect to the review of orders and findings entering into decisions of collectors of customs. And it was in that case that this Court laid down the rule (approved in the *Bush* case) that the exercise by the President of his delegated powers under statutes such as Section 336 is not subject to judicial review if the forms of procedure are regularly observed (288 U. S. 318).

of transgressed legal rights, but the action of the Tariff Commission in this case did not affect any legal rights of petitioner. In *Norwegian Nitrogen Products Co.* v. *United States, supra,* this Court, speaking through Mr. Justice Cardozo, succinctly pointed out the difference between the action of an administrative body which affects legal rights and the action of the Tariff Commission when proceeding under Section 336. Mr. Justice Cardozo said, at p. 318:

> Whatever the appropriate label, the kind of order that emerges from a hearing before a body with power to ordain is one that impinges upon legal rights in a very different way from the report of a commission which merely investigates and advises. The traditionary forms of hearing appropriate to the one body are unknown to the other. What issues from the Tariff Commission as a report and recommendation to the President, may be accepted, modified or rejected. If it happens to be accepted, it does not bear fruit in anything that trenches upon legal rights. No one has a legal right to the maintenance of an existing rate or duty. Neither the action of Congress in fixing a new tariff nor that of the President in exercising his delegated power is subject to impeachment if the prescribed forms of legislation have been regularly observed. It is very

> different, however, when orders are directed against public service corporations limiting their powers in the transaction of their business. They may be challenged in the courts if the effect is to reduce the charges to the point of confiscation. *Smyth* v. *Ames*, 169 U.S. 466. They may be challenged for other reasons when they are without evidence supporting them and are merely arbitrary edicts.

In the circumstances, there is no merit in the contention that Section 10(a) of the Administrative Procedure Act requires judicial review of the action of the Tariff Commission in making a report and its recommendations to the President under Section 336 of the Tariff Act. And as we have pointed out, *supra*, pp. 10-11, it is clear that, in any event, the Customs Court could grant no relief without disturbing the findings of the President embodied in his proclamation. It can scarcely be presumed that Congress intended Section 10(a) of the Administrative Procedure Act to require judicial review of those findings of the President, particularly in the light of this Court's holding in the *Bush* case (p. 380) that for the judiciary to probe those findings would amount to a clear invasion of legislative and executive domains.

CONCLUSION

The decision of the court below is correct, there are no conflicts of decision, and further review is not warranted. It is respectfully submitted therefore that the pettiion for a writ of certiorari should bc denied.

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AUGUST, 1952.

APPENDIX

The pertinent provisions of the Tariff Act of 1930, as amended (46 Stat. 590; 52 Stat. 1077; 19 U. S. C. 1336, 1501, 1514, 1515) read as follows:

SEC. 336. EQUALIZATION OF COSTS OF PRODUCTION

(a) Change of Classification or Duties.—In order to put into force and effect the policy of Congress by this Act intended, the commission (1) upon request of the President, or (2) upon resolution of either or both Houses of Congress, or (3) upon its own motion, or (4) when in the judgment of the commission there is good and sufficient reason therefor, upon application of any interested party, shall investigate the differences in the costs of production of any domestic article and of any like or similar foreign article. In the course of the investigation the commission shall hold hearings and give reasonable public notice thereof, and shall afford reasonable opportunity for parties interested to be present, to produce evidence, and to be heard at such hearings. The commission is authorized to adopt such reasonable procedure and rules and regulations as it deems necessary to execute its functions under this section. The commission shall report to the President the results of the investigation and its findings with respect to such differences in costs of

production. If the commission finds it shown by the investigation that the duties expressly fixed by statute do not equalize the differences in the cost of production of the domestic article and the like or similar foreign article when produced in the principal competing country, the commission shall specify in its report such increases or decreases in rates of duty expressly fixed by statute (including any necessary change in classification) as it finds shown by the investigation to be necessary to equalize such differences. In no case shall the total increase or decrease of such rates of duty exceed 50 per centum of the rates expressly fixed by statute.

(b) Change to American Selling Price.—If the commission finds upon any such investigation that such differences can not be equalized by proceeding as hereinbefore provided, it shall so state in its report to the President and shall specify therein such ad valorem rates of duty based upon the American selling price (as defined in section 402(g)) of the domestic article, as it finds shown by the investigation to be necessary to equalize such differences. In no case shall the total decrease of such rates of duty exceed 50 per centum of the rates expressly fixed by statute, and no such rate shall be increased.

(c) Proclamation By The President.—The President shall by proclamation approve the

rates of duty and changes in classification and in basis of value specified in any report of the commission under this section, if in his judgment such rates of duty and changes are shown by such investigation of the commission to be necessary to equalize such differences in costs of production.

(d) Effective Date Of Rates And Changes.—Commencing thirty days after the date of any presidential proclamation of approval the increased or decreased rates of duty and changes in classification or in basis of value specified in the report of the commission shall take effect.

(e) Ascertainment Of Differences In Costs Of Production.—In ascertaining under this section the differences in costs of production, the commission shall take into consideration, in so far as it finds practicable:

(1) In The Case Of A Domestic Article.—(A) The cost of production as hereinafter in this section defined; (B) transportation costs and other costs incident to delivery to the principal market or markets of the United States for the article; and (C) other relevant factors that constitute an advantage or disadvantage in competition.

(2) In The Case Of A Foreign Article.—(A) The cost of production as hereinafter in

this section defined, or, if the commission finds that such cost is not readily ascertainable, the commission may accept as evidence thereof, or as supplemental thereto, the weighted average of the invoice prices or values for a representative period and/or the average wholesale selling price for a representative period (which price shall be that at which the article is freely offered for sale to all purchasers in the principal market or markets of the principal competing country or countries in the ordinary course of trade and in the usual wholesale quantities in such market or markets); (B) transportation costs and other costs incident to delivery to the principal market or markets of the United States for the article; (C) other relevant factors that constitute an advantage or disadvantage in competition, including advantages granted to the foreign producers by a government, person, partnership, corporation, or association in a foreign country.

(f) Modification Of Changes In Duty.—Any increased or decreased rate of duty or change in classification or in basis of value which has taken effect as above provided may be modified or terminated in the same manner and subject to the same conditions and limitations (including time of taking effect) as is provided in this section in the case of original increases, decreases, or changes.

(g) Prohibition Against Transfers From The Free List To The Dutiable List Or From The Dutiable List To The Free List.—Nothing in this section shall be construed to authorize a transfer of an article from the dutiable list to the free list or from the free list to the dutiable list, nor a change in form of duty. Whenever it is provided in any paragraph of Title I of this Act, or in any amendatory Act, that the duty or duties shall not exceed a specified ad valorem rate upon the articles provided for in such paragraph, no rate determined under the provisions of this section upon such articles shall exceed the maximum ad valorem rate so specified.

(h) Definitions.—For the purpose of this section—

(1) The term "domestic article" means an article wholly or in part the growth or product of the United States; and the term "foreign article" means an article wholly or in part the growth or product of a foreign country.

(2) The term "United States" includes the several States and Territories and the District of Columbia.

(3) The term "foreign country" means any empire, country, dominion, colony, or protectorate, or any subdivison or subdivi-

sions thereof (other than the United States and its possessions).

(4) The term "cost of production", when applied with respect to either a domestic article or a foreign article, includes, for a period which is representative of conditions in production of the article: (A) The price or cost of materials, labor costs, and other direct charges incurred in the production of the article and in the processes or methods employed in its production; (B) the usual general expenses, including charges for depreciation or depletion which are representative of the equipment and property employed in the production of the article and charges for rent or interest which are representative of the cost of obtaining capital or instruments of production; and (C) the cost of containers and coverings of whatever nature, and other costs, charges, and expenses incident to placing the article in condition packed ready for delivery.

(i) Rules And Regulations Of President.—The President is authorized to make all needful rules and regulations for carrying out his functions under the provisions of this section.

(j) Rules And Regulations Of Secretary Of Treasury.—The Secretary of the Treasury is authorized to make such rules and regula-

tions as he may deem necessary for the entry and declaration of foreign articles of the class or kind of articles with respect to which a change in basis of value has been made under the provisions of subdivision (b) of this section, and for the form of invoice required at time of entry.

(k) Investigations Prior To Enactment Of Act.—All uncompleted investigations instituted prior to the approval of this Act under the provisions of Section 315 of the Tariff Act of 1922, including investigations in which the President has not proclaimed changes in classification or in basis of value or increases or decreases in rates of duty, shall be dismissed without prejudice; but the information and evidence secured by the commission in any such investigation may be given due consideration in any investigation instituted under the provisions of this section. [46 Stat. 701; 19 U.S.C. 1336.]

SEC. 501. NOTICE OF APPRAISEMENT; REAPPRAISEMENT

(a) The collector shall give written notice of appraisement to the consignee, his agent, or his attorney, if (1) the appraised value is higher than the entered value, or (2) a change in the classification of the merchandise results from the appraiser's determination of value.

The decision of the appraiser shall be final and conclusive upon all parties unless a written appeal for a reappraisement is filed with or mailed to the United States Customs Court by the collector within sixty days after the date of the appraiser's report, or filed by the consignee or his agent with the collector within thirty days after the date of personal delivery, or if mailed the date of mailing of written notice of appraisement to the consignee, his agent, or his attorney. No such appeal filed by the consignee or his agent shall be deemed valid, unless he has complied with all the provisions of this chapter relating to the entry and appraisement of such merchandise. Every such appeal shall be transmitted with the entry and the accompanying papers by the collector to the United States Customs Court and shall be assigned to one of the judges, who shall in every case, notwithstanding that the original appraisement may for any reason be held invalid or void and that the merchandise or samples thereof be not available for examination, after affording the parties an opportunity to be heard on the merits, determine the value of the merchandise from the evidence in the entry record and that adduced at the hearing. Reasonable notice shall be given to the importer and to the person designated to represent the Government in such proceedings of the time and place of the hearing, at

which the parties and their attorneys shall have an opportunity to introduce evidence and to hear and cross-examine the witnesses of the other party and to inspect all samples and all papers admitted or offered as evidence. In finding such value affidavits and depositions of persons whose attendance cannot reasonably be had, price lists and catalogues, reports or depositions of consuls, customs agents, collectors, appraisers, assistant appraisers, examiners, and other officers of the Government may be admitted in evidence. Copies of official documents, when certified by an official duly authorized by the Secretary of the Treasury, may be admitted in evidence with the same force and effect as original documents. The value found by the appraiser shall be presumed to be the value of the merchandise and the burden shall rest upon the party who challenges its correctness to prove otherwise.

(b) The judge shall, after argument on the part of any of the interested parties requesting to be heard, render his decison in writing, together with a statement of the reasons therefor and of the facts on which the decision is based. Such decision shall be final and conclusive upon all parties unless within thirty days from the date of the filing of the decision with the collector an application for its review shall be filed with or mailed to the United

States Customs Court by the collector or other persons authorized by the Secretary of the Treasury, and a copy of such application mailed to the consignee, or his agent or attorney, or filed by the consignee, or his agent or attorney, with the collector, by whom the same shall be forthwith forwarded to the United States Customs Court. Every such application shall be assigned by the court to a division of three judges, who shall consider the case upon the samples of the merchandise, if there be any, and the record made before the single judge, and, after hearing argument on the part of any of the interested parties requesting to be heard, shall affirm, reverse, or modify the decision of the single judge or remand the case to the single judge for further proceedings, and shall state its action in a written decision, to be forwarded to the collector, setting forth the facts upon which the finding is based and the reasons therefor. The decision of the United States Customs Court shall be final and conclusive upon all parties unless an appeal shall be taken by either party to the Court of Customs and Patent Appeals upon a question or questions of law only within the time and in the manner provided by section 198 of the Judicial Code, as amended. [46 Stat. 730; 52 Stat. 1084; 19 U.S.C. 1501.]

SEC. 514. PROTEST AGAINST COLLECTOR'S DECISIONS

Except as provided in subdivision (b) of section 516 of this Act (relating to protests by American manufacturers, producers, and wholesalers), all decisions of the collector, including the legality of all orders and findings entering into the same, as to the rate and amount of duties chargeable, and as to all exactions of whatever character (within the jurisdiction of the Secretary of the Treasury), and his decisions excluding any merchandise from entry or delivery, under any provision of the customs laws, and his liquidation or reliquidation of any entry, or refusal to pay any claim for drawback, or his refusal to reliquidate any entry for a clerical error discovered within one year after the date of entry, or within sixty days after liquidation or reliquidation when such liquidation or reliquidation is made more than ten months after the date of entry, shall, upon the expiration of sixty days after the date of such liquidation, reliquidation, decision, or refusal, be final and conclusive upon all persons (including the United States, and any officer thereof), unless the importer, consignee, or agent of the person paying such charge or exaction, or filing such claim for drawback, or seeking such entry or delivery, shall, within sixty days after, but not

before such liquidation, reliquidation, decision, or refusal, as the case may be, as well in cases of merchandise entered in bond as for consumption, file a protest in writing with the collector setting forth distinctly and specifically, and in respect to each entry, payment, claim, decision, or refusal, the reasons for the objection thereto. The reliquidation of an entry shall not open such entry so that a protest may be filed against the decision of the collector upon any question not involved in such reliquidation. [46 Stat. 734; 19 U.S.C. 1514.]

SEC. 515. SAME.

Upon the filing of such protest the collector shall within ninety days thereafter review his decision, and may modify the same in whole or in part and thereafter remit or refund any duties, charge, or exaction found to have been assessed or collected in excess, or pay any drawback found due, of which notice shall be given as in the case of the original liquidation, and against which protest may be filed within the same time and in the same manner and under the same conditions as against the original liquidation or decision. If the collector shall, upon such review, affirm his original decision, or if a protest shall be filed against his modification of any decision, and, in the case of merchandise entered for consumption, if all

duties and charges shall be paid, then the collector shall forthwith transmit the entry and the accompanying papers, and all the exhibits connected therewith, to the United States Customs Court for due assignment and determination, as provided by law. Such determination shall be final and conclusive upon all persons, and the papers transmitted shall be returned, with the decision and judgment order thereon, to the collector, who shall take action accordingly, except in cases in which an appeal shall be filed in the United States Court of Customs and Patent Appeals within the time and in the manner provided by law. [46 Stat. 734; 19 U.S.C. 1515.]

Section 10(a) of the Administrative Procedure Act (60 Stat. 237, 243; 5 U.S.C. 1009) reads as follows:

Sec. 10. Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion—

(a) Right of Review.—Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.

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